NOTICE OF MOTION AND MOTION TO COMPEL THE GOVERNMENT TO DISCLOSE THE LOCATION AND OTHER RELEVANT INFORMATION SHACK(S)

Jan. 20, 1998

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
(HONORABLE GARLAND E. BURRELL, JR.)

CR-S-96-2S9-GEB

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THEODORE JOHN KACZYNSKI,
Defendant.

NOTICE OF MOTION AND MOTION TO COMPEL THE GOVERNMENT TO DISCLOSE THE LOCATION AND OTHER RELEVANT INFORMATION SHACK(S)

Date: January 21, 1998
Time: 2:00 p.m.
Hon. Gregory G. Hollows

To: ROBERT J. CLEARY, STEPHEN P. FRECCERO, BERNARD F. HUBLEY, R. STEVEN LAPHAM, Special Attorneys to the United States Attorney General:

Please take notice that on January 21, 1998, at 2:00 p.m. or at other convenient time set by the court, before the Honorable United States Magistrate Judge Gregory G. Hollows, defendant Theodore John Kaczynski, through counsel Quin Denvir and Judy Clarke, will move the Court to compel the government to discIose the location and other relevant information about defendant's secret shack(s) . The grounds for this motion are set forth in the attached memorandum in support of the motion.

This motion is based an the instant motion, the accompanying memorandum in support of the motion, and on any other evidence or argument presented before or at the hearing on the motion.
Date: January l9, 1998

Respectfully submitted,
(signature)
QUIN DENVIR

(signature)
JUDY CLARKE

Attorneys for Defendant
Theodore John Kaczynski

In his journals, which were seized by the government in its search of his cabin, defendant Theodore John Kaczynski wrote about the construction of a shack In a remote

wilderness area in order to have a refuge to which he could retreat when the encroachments of organized society on his life at his cabin became too great to endure. At another point in the journals, he wrote about the location of a second shack, which was also in a remote wilderness area. In all the discovery provided by the government to date, there has been no mention of the shack(s) (beyond defendant's journal entries themselves) and certainly no indication that the government had located either shack.

In the middle of last week, the defense learned from a media source that the government may have located one or more of the secret shacks. When confronted with this report, the government's lawyer responded that either no shack had been located or, if one had been located, the government did not intend to rely on any evidence discovered in the shack. When advised that the defense might want to use the shack or evidence from the shack in its case, the government lawyer refused to provide any further information. Since the shack(s) and any evidence therefrom are discoverable under Federal Rule of Evidence 16(a) (1) (C) and Brady v. Maryland, 373 U.S. 83 (1963) , defendant brings this motion to compel disclosure, on shortened notice because of the scheduled commencement of trial on January 22, 1998. See Discovery Order of Gregory G. Hollows, filed Sept. 19, 1997, at 11 ("in a trial of great complexity (and no one would dispute that the instant case presents such a situation), meaningful management of the case requires that disclosure take place so as to not disrupt trial").

ARGUMENT

ANY INFORMATION REGARDING DEFENDANT'S SECRET SHACK(S) IN THE POSSESSION OF THE GOVERNMENT IS DISCOVERABLE UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 16(a) (1) (C) AND BRADY V. MARYLAND

In his journals Mr. Kaczynski wrote about constructing an 8 x 8 log shack cut into the hillside in a remote area near Diagonal Gulch, which he camouflaged with tree branches, He built the shack because of his feeling that "there's no place to escape civilization" and his hope to have "one place at least where I still feel sure of privacy." In another journal, he wrote about a different shack located in the McClellan Gulch area. The defense's efforts to locate either shack were unsuccessful. In all the discovery from the government, there has not been the slightest indication that the government had located either shack.

On January 14, 1998, the defense learned from a media source that one or both ot the secret shacks had been located by the government. Based on that information, the defense

has requested that the government provide all information in its possession concerning the location, contents, and other matters regarding the shacks. Although not denying that the government has located one or both of the shacks, the government refuses to provide any further information.

Regardless of whether the government intends to use evidence regarding a secret shack, the defense is entitled to discovery of all information In the government's possession regarding either shack. The shack(s), the locations, the methods of construction, and the contents are all potentially relevant to the issues of defendant's past and present mental status, and thus may be admissible on these issues in either the guilt or penalty phases of the trial. Accordingly, the information in the government's possession concerning the secret shacks is fully discoverable under Rule 16(a) (1) (C) as evidence "which [is] material to the preparation of the defendant's defense" or "[was] obtained from or belong[ed] to the defendant." Fed. R. Crim. P. 16 (a) (1) (C). Moreover, the information is also discoverable as potentially exculpatory evidence under Brady v. Maryland, 373 U.S. 83 (1963) (2). The government has no legitimate reason for not disclosing this information to the defense. Its failure to do so, or at least submit the matter to the Court for review, is just the latest proot that the government simply does not understand its important constitutional duties under Brady and its progeny.

CONCLUSION

For the reasons stated above, the Court must order the government to produce immediately all information in its possession relevant to defendant's shack(s) , including photographs.
Dated: January 19, l998.

Respectfully submitted,

QUIN DENVIR
JUDY CLARKE

1. Fed. R. Crim. P. 16(a) (1) (C) states in full:

(C) **Documents and Tangible Objects**. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtalned from or belong to the defendant. (Emphasis added).

2. In the penalty phase of a capital trial, a defendant is entitled to present to the jury any relevant mitigating factor in support of a sentence less than death. See, e.g. Lockett v. Ohio,

Attorneys for Defendant
Theodore John Kaczynski

438 U.S. 586 (1978); 18 U.S.C. § 3592(a) Proof of such mitigating factors is not restricted by the Rules of Evidence, rather, a defendant convicted of a capital crime may present relevant "information" to support mitigating factors. 18 U.S.C. § 3593(c) ("The defendant may present any information relevant to a mitigating factor.") . Thus, even if evidence of defendant's secret shacks were not exculpatory with respect to defendant's guilt, any information in the government's possession regarding the secret shacks is discoverable sentencing information in connection with potential mental status mitigating factors.

CERTIFICATE OF SERVICE

QUIN DENVIR, Bar No. 49374
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The undersigned hereby certifies that he is an employee in the Office of the Federal Defender for the Eastern District of California and is a person of such age and discretion as to be competent to serve papers.

On January 19, 1998, he served a copy of the attached **NOTICE OF MOTION AND MOTION TO COMPEL THE GOVERNMENT TO DISCLOSE THE LOCATION AND OTHER RELEVANT INFORMATION ABOUT DEFENDANT'S SECRET SHACK(S)** on the plaintiff by delivery as foilows:

X by facsimile and by delivering said copy addressed to the person(s) herein-after listed via inter-office mail:

Robert Cleary, Stephen P. Freccero,
Steve Lapham, Bernie Hubley
650 Capitol Mall
Sacramento, CA 95814

I declare under penalty of perjury that the foregoing is true and correct.

DATED: January 19, 1998.

(signature)
JOHN BALAZS